to assume that cable operators will be unable to compete effectively with programming services provided over video dialtone systems. Second, we propose to amend our ban to permit cable system acquisitions by LECs in markets that cannot sustain additional wire-based competition. Under this proposal, cable system owners would be able to sell their facilities to a LEC in those markets in which they would be least likely to find another buyer for them. Any remaining burden imposed by our policy is more than outweighed by its significant benefits.

53. We do not adopt BellSouth's recommendation that LECs be permitted to purchase excess capacity from cable operators. We believe, given the inherent difficulty of identifying excess capacity and the reasons that excess capacity might exist, that any rule attempting to implement such a policy would be extremely difficult to administer and subject to abuse. Moreover, as a matter of policy, we seek to encourage cable operators to use any "excess capacity" as outlets for additional programming. Allowing LECs to purchase that capacity might have the unintended effect of creating an artificial shortfall of capacity on cable systems.[69]

54. We also conclude that allowing telephone companies to lease cable company drop wires, if the lease is limited in scope and duration, would not be inconsistent with the prohibition on the acquisition of cable facilities and the goals underlying that prohibition or with our other video dialtone policies. As discussed, our prohibition on acquisitions of in-region cable facilities is intended generally to encourage the development of competing LEC and cable video delivery systems. We do not believe that permitting LECs to lease drop wires from a cable operator for a limited term of three years on a non-exclusive basis will impede the realization of this goal. In particular, we do not believe that any revenues that a cable operator may derive from such leases would be sufficient to affect materially its decision to use video dialtone or provide a competitive transmission service.[70] Moreover, permitting LECs to lease cable drops could accelerate the delivery of video dialtone services to end users and thus increase competition in the video marketplace. Therefore, we do not prohibit such leasing arrangements, provided they are executed for non-renewable terms no longer than three years. At the conclusion of the three-year period, LECs are prohibited from acquiring the cable drop wires.

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69 See, e.g., Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, FCC 94-38 at paras. 22-23, 37, 40, 238 (1994).

70 See supra note 67.

55. We also prohibit LECs from acquiring exclusive rights to use cable drops. Specifically, LECs may not unreasonably restrict the access of any video programmer to leased cable drops,[71] nor may they restrict cable operators from providing to third parties drops not covered by the LEC lease. We will require any LEC proposing to lease cable drop wires to describe in its Section 214 video dialtone application the material terms of that lease, including the cost of the lease to the LEC. We will scrutinize these terms to ensure that they are reasonable and, in particular, do not undermine our goal of promoting competitive wire-based video systems.

2. Telephone Company Activities Permissible under Video Dialtone

a. Ownership Affiliation Standards

Background

56. In the Second Report and Order, the Commission increased from 1% to up to 5% the permissible ownership interest of telephone companies in video programmers.[72] The Commission concluded that this increase was not inconsistent with the statutory restriction on telephone company provision of video programming, which does not expressly specify a particular ownership standard.[73] The Commission

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71 The nonexclusivity rule is intended to prevent LECs from dominating use of the wires and limiting the ability of end-users to choose among video service providers. For example, if a video dialtone subscriber decides to purchase cable service in addition to or instead of video dialtone, the LEC must allow the cable operator to use any leased drop wires in providing service to that subscriber.

72 The 1% ownership limitation was contained in Note 2 to Section 63.54(b) of the Rules and applied to stockholders who were officers or directors or who directly or indirectly owned 1% or more of the outstanding voting stock of a corporation with more than 50 stockholders. See 47 C.F.R. § 63.54 (b) note 2 (1991). As amended, the rule applies to "partnership interests, direct ownership interests, and stock interests in a corporation, where such stockholders are officers or directors or who directly or indirectly own 5 percent or more of the outstanding stock, whether voting or non-voting." See 47 C.F.R. § 63.54(e)(1) (1993).

73 Under the 1984 Cable Act, common carriers are prohibited from providing video programming directly to subscribers in their telephone service areas, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier. 47 U.S.C. § 533(b)(1).

further concluded that this slight increase in permissible ownership interest would encourage telephone company participation in the video marketplace without increasing the risk of anticompetitive behavior.[74]

Pleadings

57. Seventeen of the 23 petitioners seek reconsideration of the new ownership affiliation standards. Some petitioners argue that we should not have changed the rules at all; others argue that we did not change them enough and seek further liberalization of the ownership restrictions.

58. Petitioners seeking a return to the 1% standard assert that the 1984 Cable Act codified this standard and that the Commission therefore lacked authority to change it.[75] They argue, further, that any increase in permissible telephone company ownership in video programmers heightens the likelihood that telephone companies will engage in discriminatory conduct to favor their own video programming.[76] They argue that the Commission's conclusion that LECs would not discriminate was based on the questionable assumption that capacity on the basic video dialtone platform would be unlimited. They argue that, if, in fact, only a limited number of programmers are able to access the platform at one time, LECs are likely to favor affiliated programmer access and seek out programming that does not compete with affiliated programs.[77] NAB contends that the Commission will be unable, in any event, to enforce its ownership regulations because the rules do not impose reporting requirements.[78]

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74 Second Report and Order, 7 FCC Rcd at 5801, paras. 35-36.

75 CFA/CME Petition at 13-18; CLG Comments at 4; NCTA Petition at 10-13, Reply Comments at 2; NECTA Comments at 2-3. In their Comments, CFA/CME take a less definitive position, stating that "[w]hile the Cable Act does not specify explicitly the ownership interest necessary for ownership to occur ... CFA and CME believe that the Cable Act implicitly holds that a cognizable ownership interest exists at 1% ownership because that was the level in effect when Congress codified the Commission's ownership rules in the Cable Act of 1984." CFA/CME Comments at 6.

76 CFA/CME Petition at 19-23, Comments at 3; OC/UCC Petition at 4. See also CLG Comments at 4-5; NYC Petition at 2-4; NECTA Comments at 2-3.

77 CFA/CME Petition at 22; OC/UCC Petition at 4. See also NARUC Petition at 13.

78 NAB Petition at 6.

59. LECs, opposing a return to the 1% ownership standard, deny that Congress codified that standard or that a 5% standard increases the risk of discrimination.[79] LECs maintain that it is the cable companies, not LECs, that are the incumbent monopoly providers of video services, and that LECs therefore lack the ability to discriminate in the provision of video dialtone.[80] They also note that the common carrier framework adopted for video dialtone prohibits discrimination by LECs among video programmers.[81] They argue that any discrimination would be revealed in the tariff review process or could be addressed in the Section 208 complaint process.[82] They note, further, that the largest LECs are subject to special nonstructural safeguards that further protect against any anticompetitive conduct.[83] They assert that video programming is just another enhanced service and need not be subject to onerous ownership restrictions, especially given that LECs are allowed full ownership interests in other enhanced services.[84]

60. Many LECs argue that the Commission did not go far enough in increasing the permissible level of LEC ownership in video programmers. They maintain that a more liberal standard would provide necessary incentives for LECs to participate in video dialtone provisioning, while increasing the diversity of video programming.[85] Some argue that, if LECs are unable to develop

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79 See, e.g., NYNEX Reply Comments at 2-4; USTA Comments at 7.

80 See, e.g., USTA Comments at 8-9; Ameritech Reply Comments at 5-6. See also SWBT Reply Comments at 1-4.

81 Ameritech asserts that deployment of video dialtone systems based upon broadband switching eliminates all interim concerns over potential discriminatory conduct. Ameritech Comments at 8.

82 NYNEX Reply Comments at 2-4; Ameritech Reply Comments at 5. See also Second Report and Order, 7 FCC Rcd at 5827, para. 89.

83 NYNEX Reply Comments at 2-4; Ameritech Reply Comments at 6. See Computer III Remand Proceeding: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991), (BOC Safeguards Order), vacated in part and remanded, California v. Federal Communications Commission, Nos. 92-70083, 92-70186, 92-70217, and 92-70261, slip op. 12743, 12774-5 (9th Cir. Oct. 18, 1994) (1994 U.S. App. LEXIS 29001) (California v. FCC). See also Second Report and Order, 7 FCC Rcd at 5828, para. 90.

84 NYNEX Reply Comments at 2-4. See 47 C.F.R. § 64.702 (1993).

85 PacTel Petition at 20-22; UTC Petition at 2; GTE Petition at 12-14; USTA Comments at 7; SWBT Comments at 1-6; SNET Comments at 5; Ameritech Reply Comments at 6; Bell Atlantic Reply Comments at

their own programming and are thus dependent on the whims of established programmers, with their substantial links to large cable operators, LECs may not be able to secure quality programming for their video dialtone facilities.[86] They argue that, contrary to the Commission's assertion, a 5% ownership limit is not likely to enable LECs to provide the capitalization necessary to foster development of new, independent programming.[87] They argue that incentives to invest in video dialtone are further diminished to the extent LECs are largely restricted to common carrier returns and do not have an opportunity to share in the programming revenue stream.[88]

61. Several LECs assert that the Commission must increase the noncognizable ownership level above 5% in order to conform its rules to the cross-ownership provisions of the 1984 Cable Act.[89] They argue that the 1984 Cable Act merely prohibits LECs from "controlling" video programmers whereas the Commission's ownership affiliation rules have the broader purpose of preventing the "potential for influence or control."[90] Some LECs urge adoption of ownership attribution standards similar to the Commission's cable cross-ownership restrictions and the broadcast multiple ownership

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2-3. SWBT argues that because existing cable companies already have monopoly or near monopoly control over video service distribution to most households, restricting local telephone company participation will only impede development of competition. SWBT Petition at 3-5. <u>See also</u> Ameritech Petition at 7-8; Bell Atlantic Petition at 3-4; NYNEX Petition at 4-5; PacTel Petition at 18-22; SWBT Petition at 6-8; UTC Petition at 1-4; US West Petition at 6-9; GTE Petition at 12-14; BellSouth Petition at 6-7; SNET Comments at 5.

86 GTE Petition at 12-14; Ameritech Petition at 7. LECs deny that their concerns over access to quality programming are addressed by provisions of the 1992 Cable Act that preclude exclusive contracts between cable operators and programmers. Ameritech Comments at 7; Bell Atlantic Reply Comments at 3.

87 Ameritech Petition at 7, Comments at 7; GTE Petition at 12-14; SWBT Petition at 7. <u>See</u> <u>Second Report and Order</u>, 7 FCC Rcd at 5801, para. 35.

88 Ameritech Petition at 7, Comments at 7; GTE Petition at 12-14.

89 USTA Comments at 5-6; Ameritech Comments at 6-7; Bell Atlantic Petition at 2-3, Comments at 2.

90 Ameritech Comments at 6-7; PacTel Petition at 19; NYNEX Petition at 4-5; Bell Atlantic Petition at 2-3, Comments at 2; SWBT Petition at 6-7; USTA Comments at 5-6.

attribution standards contained in Sections 76.501 and 73.3555 of the Commission's rules, respectively.[91] Most assert that ownership interests of up to 49% should be permitted if there is a single majority shareholder,[92] and that non-voting ownership interests should be treated as noncognizable, similar to the cable/broadcast cross-ownership rules.[93] Some argue that any ownership interest short of a 50% voting interest should be deemed non-cognizable.[94] PacTel asserts that no passive investment should be prohibited.[95] USTA objects to any numerical ownership limit.[96] US West states that it does not object to a 5% ownership limitation if there is no single majority shareholder; it proposes a 25% ownership limit if there is a single majority shareholder.[97] Several parties caution the Commission to construe the programming prohibition as narrowly as possible to avoid unnecessarily restricting local telephone companies' fundamental First Amendment rights.[98]

62. In reply to LEC requests for further relaxation of the ownership restrictions, several parties assert that LECs do not need additional incentives in the form of increased ownership interests to deploy a ubiquitous common carrier broadband network infrastructure.[99] They maintain that LEC concerns over program availability have been resolved by program access provisions which curtail the ability of cable operators to obtain exclusive rights to programming.[100]

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91 Ameritech Reply Comments at 3; US West Petition at 7-9; BellSouth Comments at 6-7.

92 PacTel Petition at 19-20; Bell Atlantic Petition at 2-4; US West Petition at 8-9; BellSouth Comments at 6; SNET Comments at 6.

93 Ameritech Reply Comments at 3; PacTel Petition at 20; Bell Atlantic Petition at 2-4; US West Petition at 8-9.

94 United Petition at 2-4; SWBT Petition at 7.

95 PacTel Petition at 19.

96 USTA Comments at 5-11.

97 US West Petition at 8-9.

98 Ameritech Comments at 5, Reply Comments at 8-9; USTA Comments at 4; SWBT Comments at 9, 15.

99 ACT Petition at 9-12; NAB Petition at 8; CFA/CME Comments at 8-9.

100 INTV Petition at 7-11; see also NAB Comments at 7; CFA/CME Comments at 8.

63. Some parties specifically oppose adoption of rules paralleling the cable/broadcast cross-ownership rules, asserting that these rules are designed primarily to promote diversity, not prevent discrimination.[101] They also argue that the cable/broadcast rules governing passive investments contemplated pure investors, such as investment companies, banks, and insurance companies, with no interest in controlling the companies in which they invested. They argue that these rules should not apply to LECs, since LECs have made it clear that they seek to control video programming.[102] Additionally, they argue that LECs could not possibly be passive investors in programmers because, as operators of the video dialtone network, they would necessarily engage in contact or communications with programmers.[103] Finally, they argue that more restrictive ownership rules are especially appropriate in light of the significant non-ownership affiliations that LECs may have with video programmers.[104]

Discussion

64. We affirm the ownership affiliation standard of up to 5%, as adopted in the Second Report and Order. We modify the Second Report and Order, however, by defining more clearly the application of the standard. As discussed more fully below, we hold that, consistent with the statutory prohibition on provision by LECs of video programming to subscribers in their telephone service areas, a LEC may not hold an ownership interest of 5% or greater in a video programmer that offers service in the LEC's telephone service area. For purposes of the video dialtone rules, we define a video programmer as any person who provides video programming directly, or indirectly through an affiliate, to subscribers. Any entity shall be deemed to "provide" video programming if it determines how video programming is presented for sale to subscribers, including making decisions concerning the bundling or "tiering" of the programming or the price, terms, or conditions on which the

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101 NCTA Comments at 5-6.

102 NAB Comments at 9-10.

103 NAB Comments at 10-11. NAB notes that, in the broadcast context, the Commission has held that in order to maintain its passive role, an entity must refrain from contact or communication with the licensee on any matters pertaining to the operation of its stations. Id. (citing Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities, 97 FCC 2d 997, 1013-14 (1984) recon. granted in part, 58 RR 2d 604 (1985), further recon., 1 FCC Rcd 802 (1986) (Attribution of Ownership).

104 NAB Comments at 11. See also CFA/CME Comments at 6-7.

programming is offered to subscribers. We first address our decision to affirm the ownership affiliation standard of up to 5%. We then discuss our clarification that the standard applies to LEC ownership interests in video programmers, not video programming.

65. In the Second Report and Order, we addressed and rejected assertions that Congress intended to codify the interpretive notes to Section 63.54 of our Rules and that we are thereby precluded from modifying those notes. We stated that, while Congress indicated in the legislative history of the 1984 Cable Act its intention to codify our preexisting cross-ownership rules, Congress did not intend to codify every aspect of our rules. In support of this assertion, we noted that Congress changed the language of our cross-ownership rules, specifically codifying some aspects of these rules, while overruling others. We also noted that Congress could have explicitly codified Notes 1 and 2 had it intended to, but did not. Finally, we noted that nowhere in the legislative history of the 1984 Cable Act did Congress specifically indicate its intent to codify the interpretive notes to our rules.[105]

66. The absence of any indication that Congress specifically intended to codify Notes 1 and 2 is particularly significant in light of the fact that, just prior to the adoption of the 1984 Cable Act, the Commission had raised the cognizable media multiple ownership attribution standard from 1% to 5%.[106] This action took place in a comprehensive rulemaking proceeding in which the Commission concluded that an ownership interest of up to 5% in a broadcast licensee or cable television system conferred insufficient ability to exert influence or control.[107] Given this action by the Commission, we believe that, had Congress intended to preclude us from similarly revising the telephone company-cable television cross-ownership provision, it would have made this clear. The fact that it did not do so underscores our conclusion that, while Congress intended to codify the policy underlying those rules, it did not intend to codify the specific rules themselves.

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105 See Second Report and Order, 7 FCC Rcd at 5815-19 paras. 66-72 (citing Report of the Committee on Energy and Commerce to accompany H.R. 4103, Cable Franchise Policy & Communications Act of 1984, H.R. Rep. No. 934, 98th Cong., 2d Sess. at 56-67 (1984)) (House Cable Report).

106 See Attribution of Ownership, supra note 103. In 1984 the Commission increased to 5% the ownership attribution standard governing ownership of broadcast stations, cable television, and newspaper entities. See id.; 47 C.F.R. §§ 73.3555 and 76.501 (1993) (hereinafter referred to as the mass media multiple ownership rules).

107 Attribution of Ownership, 97 FCC 2d at 1003-07, paras. 6-29.

No party has offered any new arguments or otherwise convinced us that our conclusion was incorrect.

67. We reject assertions that raising the ownership limit from 1% to 5% will increase the likelihood of discrimination by LECs or is not in the public interest absent imposition of reporting requirements. As noted above, an ownership interest of up to 5% is recognized in other areas of the Commission's ownership rules as being a noncognizable interest. As such, we find that an ownership interest of up to 5% will not materially increase incentives for LECs improperly to favor some video programmers over others. To the extent a LEC attempts any discrimination, such actions would likely be brought to our attention, either in the Section 214 process, tariff review process, or through the Section 208 complaint process. In the event of a complaint alleging discrimination against a particular programmer, any violations of our ownership rules would likely be revealed through the discovery process. We also note that the largest LECs are subject to additional safeguards designed to prevent discrimination. Under the circumstances, we reject as speculative assertions that our ownership rules are likely to lead to significant undetectable discrimination by LECs.

68. We also reject requests that we permit all ownership limits up to 49%. As an initial matter, we reject assertions that we are required under the 1984 Cable Act to increase the noncognizable ownership level above 5%. As stated above, in enacting the cross-ownership provisions of the 1984 Cable Act, Congress intended to codify Commission policy underlying its then-extant rules in this area, which at the time permitted only 1% ownership interests. If Congress had wanted to require us to change our cross-ownership limit from 1% to 49%, as argued by some LECs, we believe it would have so indicated. We also reject arguments that we should exercise our discretion to raise the ownership limit above 5%. The Commission has previously found that few, if any, of the publicly held corporations that it regulates as broadcast licensees have more than one or two shareholders owning more than a 5% equity interest. We concluded that the great majority of shareholders holding a 5% or greater interest in such entities are the "preeminent shareholders in their respective companies, with enough votes potentially to affect the outcome of elective or discretionary decisions and to command the attention of management."[108] We concluded, further, that a greater level of ownership could confer a "substantial and influential interest."[109] Moreover, the Commission has long recognized that minority

108 Id. at 1005-06, para. 14.

109 Id. at para. 15.

ownership interests can confer de facto control.[110] Under the circumstances, we do not believe that we should raise the ownership threshold above 5% at this time.[111]

69. We also decline suggestions that we adopt ownership attribution standards identical to the mass media multiple ownership standards. The mass media multiple ownership rules are intended primarily to ensure diversity of information sources to the American public.[112] Our video dialtone construct has additional purposes, including not only promoting diversity of video programming sources, but also reducing the likelihood of discrimination by LECs in their provision of video dialtone service. Thus, for example, while a nonvoting ownership interest, which confers no power to control or influence decision making, may not implicate the purposes of the mass media multiple ownership rules, that same interest may raise concern about incentives for discrimination. The same could be true for a 49% interest in an entity with a single majority shareholder. In light of these different goals, we decline to apply all aspects of the mass media multiple ownership rules to video dialtone.[113] We do, however, modify the Second Report and Order by clarifying that the provisions of our mass media multiple ownership standards relating to vertical ownership chains, not involving investment companies, do apply in the video dialtone context.[114] While the Second Report and Order did not specifically address this issue, these rules are essential to ensure that LECs cannot avoid ownership limitations by using intervening corporate entities.

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110 See Sewell, "Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934," 43 Fed. Com. L.J. 277, 296-98 (1991). See generally Intermountain Microwave, 24 R.R. 983 (1963).

111 See In the Matter of the Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 and Development of Competition and Diversity in Video Programming Distribution and Carriage, 8 FCC Rcd 3359 (1993) (Competition and Diversity Order) (relying on video dialtone attribution standard and adopting 5% ownership standard in vertical integration rules for cable operators and programming vendors).

112 Attribution of Ownership, 97 FCC 2d at 1004, para. 11.

113 See Competition and Diversity Order, 8 FCC Rcd at 3370-71, para. 32 (declining, for similar reasons, to exempt passive ownership interests or to adopt single majority shareholder rule as part of vertical integration rules for cable operators).

114 See 47 C.F.R. § 76.501 note 2(d) (1993).

70. We are not persuaded by LEC arguments that, if the ownership limits are not increased, LECs will lack incentives to invest in video dialtone or to provide financing to independent video programmers. As an initial matter, we are unconvinced by assertions that our ownership restrictions will deny LECs needed sources of video programming. As discussed below, LECs are permitted to own video programming, and they may finance the development of programming that others distribute on the LECs' video dialtone systems.[115] In addition, as noted by some parties, the program access provision in the 1992 Cable Act and the Commission's implementing rules should further ensure access to sufficient programming for distribution on the video dialtone system. Moreover, LECs are free to engage in a number of video-related activities. Thus, our rules permit LECs to offer common carrier video delivery services and a host of enhanced and other nonregulated services. They also permit LECs to own up to a 5% interest in a video programmer and to enter into a wide range of non-ownership affiliations with video programmers other than cable operators. These avenues should provide LECs with more than sufficient incentives to deploy video dialtone networks.

71. We also reject LEC arguments that we should construe the cross-ownership ban more narrowly in light of potential First Amendment issues. Several LECs have challenged the constitutionality of this ban in court.[116] To the extent these challenges are successful, we will replace our cross-ownership rules with appropriate alternative regulatory measures. At this point in time, however, we believe that our rules are narrowly tailored to serve legitimate Congressional goals.

72. While we thus retain our current ownership restrictions, we anticipate that some relaxation of the rules may be warranted in the future. In particular, we anticipate further relaxation of the ownership limits when the capacity of LEC video dialtone systems can be readily expanded through, for example, digital transmission technology. We believe that, as technical and economic constraints on the expandability of video dialtone system capacity diminish, any ability of LECs to discriminate against nonaffiliated programmers will likewise be reduced. At such point, we believe it would be consistent with the policies underlying our current cross-ownership rules and with Congressional intent for us to consider reexamining these ownership restrictions.

73. Finally, in the Second Report and Order, there appear to be some ambiguities regarding the types of affiliations to which

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115 See infra paras. 73-74 and 87-102.

116 See supra note 24.

the attribution standard is intended to apply.[117] We therefore take this opportunity to resolve these ambiguities. The 1984 Cable Act by its terms does not prohibit LECs from owning video programming. Rather, it prohibits any common carrier from providing "video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier."[118] We believe that the statutory references to the provision of video programming, rather than the ownership of video programming, are deliberate. At the time of enactment of the 1984 Cable Act, there was considerably less vertical integration in the cable television industry than there is now,[119] and the BOCs, which served the large majority of the country's access lines, were not permitted under the terms of the AT&T divestiture to offer information services within their service areas.[120] Congress thus had little reason to be concerned about the ownership of video programming by cable operators or LECs. It was concerned, however, that the pervasive reach of the telephone companies, combined with their market power, could endanger the cable industry and potentially eliminate a valuable information source for the American public.[121] For these reasons, Congress prohibited telephone companies from competing with cable operators in the provision of video programming in the LECs' local service areas.

74. Consistent with the cross-ownership provisions of the 1984 Cable Act, we clarify that our cross-ownership rules do not prohibit LECs from owning video programming, even programming that another, independent programmer (i.e., a programmer neither owned nor controlled by the LEC) provides over the LEC's video dialtone system. Nor is any LEC prohibited from owning entities that

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117 For example, in paragraph 36, the Second Report and Order permits up to 5% ownership of "video programmers" by telephone companies. In paragraph 14, however, it discusses cognizable financial interests in "video programming." Compare 7 FCC Rcd at 5801, para. 36 with 7 FCC Rcd at 5789, para. 14.

118 47 USC § 533(b)(1).

119 See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd 4962, 5007-08, para. 90 (1990).

120 Restrictions on BOC provision of information services were lifted in 1991. United States v Western Elec. Co., Inc., 767 F.Supp. 308 (D.D.C. 1991), aff'd, 993 F.2d 1572 (D.C. Cir. 1993), cert. den., Consumer Federation of America v. United States, 114 S.Ct. 437 (1993).

121 See House Cable Report, supra note 105.

provide video programming outside its service area. LECs may not, however, provide or distribute any video programming directly to subscribers in their telephone service area. Further, LECs may not hold a cognizable ownership interest, as defined above, in any entity that provides video programming directly to subscribers in their telephone service area. Any entity shall be deemed to "provide" video programming if it determines how video programming is presented for sale to subscribers by making decisions concerning the bundling or "tiering" of the video programming, or the price, terms, or conditions on which the video programming is offered to subscribers.

b. Non-Ownership Relationships and Activities Between Telephone Companies and Video Programmers

Background

75. Prior to adoption of the Second Report and Order, telephone companies were strictly limited to the carrier-user relationship in the provision of any type of service or activity related to video programming.[122] In the Second Report and Order, the Commission concluded that LECs could exceed the carrier-user relationship with video programmers in certain circumstances without violating the statutory prohibition against telephone company provision of video programming directly to subscribers in the LECs' telephone service area. The Commission also concluded that the public interest would be served if it permitted LECs this additional freedom.

76. Specifically, the Commission held that LECs should be permitted to exceed the carrier-user relationship with video programmers that are customers of, interconnect with, or share the construction and/or operation of the basic video dialtone platform. LEC provision of nonregulated services related to video programming, such as video gateways, was made contingent upon their provision of a common carrier video dialtone platform with sufficient capacity to serve multiple video programmers.[123]

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122 Under our rules, the carrier-user restriction limited telephone companies to the provision of common carrier services underlying video distribution, specifically precluding telephone companies from providing video programming and video-related enhanced services, such as video processing functions and video gateways, or entering into other non-tariffed relationships with a provider of video programming within their telephone service areas.

123 Second Report and Order, 7 FCC Rcd at 5789, para. 14.

77. Among the non-ownership relationships specifically enumerated were: the offering of enhanced services related to video programming; joint ventures to share costs and construction and operation of facilities; interconnection arrangements; debtor-creditor relationships; consultant-client relationships; and other relationships that do not constitute ownership or control.[124] To assure compliance with the statutory cross-ownership restriction, the Commission held that determining how video programming is presented for sale to consumers, including making decisions concerning the bundling or tiering, or the price, terms and conditions of video programming offered to consumers, or otherwise holding a cognizable financial interest in, or exercising editorial control over, video programming provided directly to subscribers within a LEC's telephone service area were still prohibited activities.[125]

Pleadings

78. Several petitioners assert that the Commission erred in permitting LECs to exceed the carrier-user relationship with video programmers. They assert that the permitted non-ownership relationships could foster anti-competitive conduct by LECs, cable companies, and video programmers.[126]

79. CFA/CME assert that permitting LECs and cable companies to share construction and operation of the video dialtone system will reduce facilities-based competition because: (1) cable companies investing in video dialtone systems would likely abandon their cable systems in favor of the video dialtone system, thereby creating a new monopoly; (2) video dialtone systems would likely be designed so as not to duplicate or compete with existing cable features, but rather complement them; (3) joint ventures facilitate collusion, because venturers often agree, expressly or implicitly, not to compete directly with each other.[127] CFA/CME argues that the Commission offered no sufficient explanation of the need for joint ventures and no hard evidence that joint ventures are a necessary incentive for LEC participation in video dialtone.

80. CFA/CME assert, further, that allowing LECs to offer enhanced services and to enter into joint ventures with video

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124 Id. at 5798, para. 31.

125 Second Report and Order, 7 FCC Rcd at 5789, para. 14.

126 CFA/CME Petition at 2-11; NAB Comments at 6; ACT Petition at 11; NCTA Petition at 16.

127 CFA/CME Petition at 3-8. See also NCTA Petition at 16, Reply Comments at 1-2.

programmers gives the LEC a financial stake in the success of such programmers, thereby creating incentives for LECs to discriminate against other programmers. It argues that discrimination against unaffiliated video programmers could manifest itself in a number of subtle ways, including: better service, faster implementation of programming, sharing of marketing information, and favorable pricing to affiliated video programmers. In addition, CFA/CME argue LECs might design their systems to favor certain programmers and provide such programmers with "insider" information about the capabilities and limitations of video dialtone systems, as well as advance knowledge of new network features.[128]

81. NCTA asserts that the carrier-user restriction was codified in the 1984 Cable Act and that the Commission exceeded its authority in altering the restriction.[129] Several petitioners argue that permitting joint ventures and financing contravenes the cross-ownership restriction by increasing the ability of LECs to exert influence over the video programmer to the point of control.[130] NCTA asserts that permitting telephone companies to offer enhanced gateway services is tantamount to permitting the provision of programming, contrary to the statutory restriction.[131]

82. Two petitioners assert it will be virtually impossible for the Commission to ensure that telephone companies do not control video programmers.[132] NAB asserts that the Commission has no means of gathering information from LECs regarding their interests in and agreements with video programmers. CFA/CME argue that the Commission's non-ownership restrictions are too ambiguous to be effective.

83. LECs support the easing of non-ownership restrictions, asserting that joint ventures and other non-ownership affiliations will promote deployment of video dialtone, increase diversity of services, and improve the ability of programmers to reach

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128 CFA/CME Petition at 9-11. See also NAB Comments at 6.

129 NCTA Reply Comments at 3-5.

130 NAB Petition at 5, Comments at 5-6; ACT Petition at 11-12; NCTA Petition at 14-15, Reply Comments at 3-5.

131 NCTA Reply Comments at 3-5. For example, NCTA contends that selecting video programmers' participation in a gateway, determining availability of access to a gateway, encouraging participation in a gateway, and retailing gateway packages constitute the selection and provision of video programming.

132 NAB Petition at 6; CFA/CME Petition at 11-12.

consumers.[133] They also support the Commission's conclusion that these rule changes are consistent with the 1984 Cable Act.[134] They oppose, however, the Commission's decision to require LECs to establish a basic video dialtone platform before offering video-related enhanced services. They also oppose limiting both non-ownership relationships and offerings of enhanced services to programmers that have a nexus to the platform. Noting that the Commission acknowledged these restrictions are not required by the 1984 Cable Act, they assert the Commission did not provide any logical basis for imposing them.[135]

84. LECs contend that the conditions on non-ownership relationships unnecessarily restrict the ability of LECs to develop and offer enhanced services.[136] SWBT argues that since LECs will be new entrants in the video services market, competing against a monopoly incumbent provider, the Commission should impose no limitations beyond those mandated by the 1984 Cable Act.[137] Several LECs argue that the Commission's new policy is anticompetitive -- essentially a mandated tying arrangement -- and that it is anomalous for the Commission to require "bundling" of video services when it requires unbundling in so many other areas.[138] Ameritech suggests that the Commission could achieve its goal of encouraging LEC deployment of video dialtone systems, without limiting LEC provision of enhanced services to users of the basic platform, simply by requiring LECs to make available a basic platform before providing such services.[139]

85. US West argues that requiring LECs to build a basic platform before entering into relationships that exceed the carrier-user relationship will impede development of video dialtone

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133 Ameritech Comments at 7-8; Bell Atlantic Reply Comments at 2-3.

134 Bell Atlantic Comments at 2-3; NYNEX Comments at 6-7; US West Petition at 2-3.

135 Ameritech Petition at 4-5; SWBT Petition at 10-11; NYNEX Petition at 6-7; BellSouth Comments at 14; SNET Comments at 6-8; US West Petition at 2-5; Bell Atlantic Comments at 2-3.

136 Ameritech Petition at 3-6; NYNEX Petition at 7; SWBT Petition at 11; SNET Comments at 6-8.

137 SWBT Petition at 3-5, 10-11.

138 NYNEX Petition at 7; Ameritech Petition at 5; SNET Comments at 7.

139 Ameritech Petition at 5.

systems. US West argues that LECs will be reluctant to build video dialtone systems unless they can share the risks of such systems with video programmers.[140] US West also argues that the Commission's actions represent a re-regulation of enhanced services without proper notice and comment.[141] Bell Atlantic asks us to clarify that LECs remain free to provide services "unrelated to the provision of video programming," such as billing and collection, inside wire installation and maintenance, customer premises equipment sale and maintenance, and other enhanced services, to unaffiliated video programmers.[142] Likewise, GTE seeks clarification of the reach of the carrier-user restriction remaining in the Commission's rules.[143]

86. In response to the LEC petitions, other petitioners assert that the Commission properly imposed the limitations to ensure that LECs do not simply use their new non-ownership affiliation rights to provide enhanced services over existing facilities and fail to construct the broadband common carrier platform.[144] Prodigy and IIA dispute US West's assertion that the Commission's requirements constitute a re-regulation of enhanced services.[145] Prodigy argues that these requirements are, rather, analogous to the comparably efficient interconnection requirements of the Computer III safeguard regime.

Discussion

87. We affirm our decision to permit LECs to enter into non-ownership relationships that exceed a carrier-user relationship with video programmers, but modify our rules in this area in several respects. As modified, our rules impose tighter restrictions on LEC relationships with franchised cable operators than with other video programmers. We allow LECs, under certain circumstances, to provide enhanced or other nonregulated services related to the provision of video programming to cable operators, in their telephone service areas. These services might, for example, include video gateway or billing and collection services.

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140 US West Petition at 4-5. The Second Report and Order specifically permits LECs to engage in joint ventures with video programmers who share construction and/or operation of the basic platform. See 47 C.F.R. § 63.54(d)(2) (1993).

141 Id.

142 Bell Atlantic Petition at 4-5. See also SWBT Petition at 11.

143 GTE Petition at 8-12.

144 NAB Comments at 12; see also OC/UCC Petition at 2.

145 Prodigy Comments at 3; IIA Comments at 2.

We also allow LECs to lease cable drop wires from cable operators, subject to certain conditions.[146] We do not otherwise generally allow a LEC to exceed the carrier-user relationship with cable operators in the LEC's telephone service area. On the other hand, we permit LECs, subject to certain conditions, to enter into a broad range of non-ownership relationships with video programmers who are not franchised cable operators, provided those relationships do not involve such programmers in the operation of the basic video dialtone platform.[147] Those relationships might include, for example, providing enhanced and other nonregulated services, as well as entering into joint ventures, debtor-creditor, and other relationships that do not confer ownership or control.

88. We relax the non-ownership rules established in the Second Report and Order in two respects: First, we permit LECs to offer enhanced and other nonregulated services related to video programming to any video programmer, in areas substantially served by a video dialtone platform, without regard to whether the video programmer purchasing such services has a nexus to that platform. An area shall be considered substantially served by a video dialtone platform if video dialtone service is available to a significant majority -- i.e., 70% -- of the households in that area.[148] Second, we permit LECs to enter into other types of non-ownership relationships with video programmers who are not franchised cable operators, without regard to the existence of a video dialtone platform.

89. We also tighten the non-ownership rules in two respects. First, we generally prohibit LECs from exceeding the carrier-user

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146 See supra paras. 54-55. In addition, LECs may continue to offer channel service to any franchised cable operator or other video programmer, since channel service is consistent with a carrier-user relationship.

147 As noted above, four courts have ruled the 1984 Cable Act ban on telephone company provision of video programming unconstitutional. See supra para. 15 and note 24. This Order does not address the regulatory framework that applies to LECs that provide video programming directly to subscribers.

148 Thus, for example, a LEC would be able to offer enhanced and other nonregulated services related to the provision of video programming to a cable operator if video dialtone were available to 70% of the households in that cable operator's service area. The LEC would continue to be able to provide such services in connection with the provision of video programming over the video dialtone system itself, as permitted under the Second Report & Order, because the basic video platform would be available to all the households for which the video programmer seeks such services.

relationship in their telephone service area with franchised cable operators, except to provide enhanced or other nonregulated services related to the provision of video programming in areas substantially served by a video dialtone platform,[149] or to lease cable drop wires.[150] Second, we generally prohibit affiliations between LECs and any video programmer for the purpose of operating a basic video dialtone platform.

90. We relax our non-ownership rules as described above because those rules as originally structured appear to be more restrictive than necessary to achieve our objectives. In the Second Report and Order, we permitted LECs to exceed the carrier-user relationship with a video programmer, but only if that programmer was a customer of, interconnected with, or shared the construction or operation of the basic video dialtone platform.[151] In requiring this connection, we explained that we believed it necessary "to assure that, in exceeding the current carrier-user relationship, telephone companies will both provide the basic platform to video programmers and use it as the basis for their own participation in the video marketplace."[152] We were concerned that, absent this link, telephone companies might forego investing in video dialtone, limiting themselves instead to providing services on existing cable facilities.

91. We now conclude that our goal of encouraging LECs to build and use basic video dialtone platforms can be achieved without requiring that purchasers of LEC enhanced or other nonregulated services related to the provision of video programming maintain a nexus to those platforms. So long as a LEC has built a basic platform that satisfies our video dialtone requirements, and that is available in a particular video programmer's service area, there is no public interest justification for prohibiting the LEC from offering enhanced or other nonregulated services to that video programmer, even if the programmer has no nexus to the platform. Indeed, permitting that video programmer to purchase

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149 As noted above, we propose in the Third Further Notice to modify our prohibition on LEC acquisition of cable facilities by permitting such acquisitions in certain areas. We also propose in that notice to permit LECs and cable operators jointly to construct video dialtone systems in such areas. See infra Third Further Notice, paras. 276-279.

150 For discussion of our reasons for permitting LECs to lease drop wires from a cable operator in their service areas, see supra paras. 54-55.

151 Second Report and Order, 7 FCC Rcd at 5789, para. 14.

152 Id. at 5798-99, para. 31.

such services from the LEC expands the range of potential customers of LEC enhanced and nonregulated services, thereby increasing LEC incentives to build video dialtone systems. At the same time, permitting LECs to provide services to video programmers who have no nexus to a video dialtone platform, including cable operators, benefits video programmers by enabling them to take advantage of such services, even if they choose not to use video dialtone as their transmission medium.

92. We recognize that a video programmer's service area often will not coincide precisely with the area served by a video dialtone platform. For example, a cable operator's franchise service area that substantially overlaps a video dialtone service area may include households outside the video dialtone service area. In that situation, so long as the LEC has made video dialtone available to a significant majority of the households in the area in which the cable company seeks enhanced or other nonregulated services from the LEC, there would be no reason to prohibit the LEC from providing enhanced or other nonregulated services to that cable operator. We therefore hold that LECs may provide enhanced and other nonregulated services within their telephone service area to a video programmer if video dialtone is available to a significant majority of the households in the area in which the video programmer seeks such services. We also hold that, for purposes of applying this rule, 70% of the households in the area in which a video programmer seeks enhanced or other nonregulated services would constitute a "significant majority." We acknowledge that this seventy percent standard is not the only standard that we could have adopted. We believe, however, that this standard is reasonable because it does require that video dialtone be available to a significant majority of households within the area in which the video programmer seeks to take LEC nonregulated services and thus provides LECs with the necessary incentives to deploy video dialtone.

93. We also permit LECs to enter into certain other non-ownership relationships (e.g., joint ventures and debt financing) within their service area with video programmers who are not cable operators, without regard to the existence of a video dialtone platform. Eliminating the requirement that LECs build a video dialtone platform before establishing these other relationships will not compromise our goal of encouraging video dialtone deployment. The revenues offered by a video dialtone system, including the ability of LECs to provide enhanced and other nonregulated services in areas substantially served by video dialtone, should provide ample incentives for LECs to construct video dialtone platforms. Indeed, it is not clear that the rule adopted in the Second Report and Order would further the goal of ensuring widespread deployment of video dialtone systems. Under that rule, it could be argued that a LEC could enter into a non-ownership relationship with any video programmer who had a nexus to a single video dialtone platform of that LEC. Thus, for example,

a LEC could provide debt financing to a national video programmer if that programmer offered one program on one video dialtone platform operated by that LEC. We do not believe that this required nexus has a sufficiently compelling relationship to our goals to retain it.

94. While a stricter interpretation of the non-ownership relationships rule adopted in the Second Report and Order would be possible, we do not believe that such an interpretation would serve the public interest. For example, prohibiting LECs from affiliating with video programmers who offer programming via cable or other transmission systems in the LEC region in areas not served by a video dialtone platform could make it impracticable in the near future for many small, independent programmers to obtain debt financing from a LEC, since the price of such financing would be a much more limited market for their product. Likewise, it could effectively deny LECs the ability to provide financing to programmers in order to stimulate usage of video dialtone systems.

95. While we thus liberalize our non-ownership relationship rules in certain respects, we also narrow these rules in other respects. First, we generally prohibit LECs from exceeding the carrier-user relationship in their telephone service area with any franchised cable operator, except (as described above) to provide enhanced or other nonregulated services related to the provision of video programming in an area substantially served by a video dialtone platform, or to lease cable drop wires. One of the primary goals of this proceeding is to lay the groundwork for the development of competition in wire-based video delivery services.[153] We believe that allowing a broad range of affiliations between LECs and cable operators in a LEC's telephone service area could undermine this goal. For example, permitting LECs and cable operators to construct or operate jointly a video dialtone platform could encourage cable operators to abandon their facilities in favor of the video dialtone platform. Indeed, we consider it highly unlikely that a cable operator would participate in the construction or operation of a video dialtone system unless it planned to use or was using that platform. In that event, the public would lose the benefit of competition provided by the cable system. Conversely, LECs might be inclined to underwrite a cable operator instead of building competing video distribution systems. Moreover, even in markets in which LECs build video dialtone systems, incentives to compete vigorously could be tempered by debt financing, joint ventures, and other non-ownership relationships with the cable operator. We are particularly concerned about that possibility given that, in the near-term, the LEC and cable

153 It is largely for this reason that we generally prohibit LECs from acquiring cable facilities in their service area for use in provision of video dialtone. See supra paras. 48-55.

operator are likely to be the only two wired-based video systems in most markets. Under the circumstances, the risks of anticompetitive consequences outweigh any public gain that could be offered by permitting such relationships.

96. Second, we generally prohibit cable operators or any other video programmers from participating in the operation of a basic video dialtone platform. Unlike LECs, which are subject to Title II of the Communications Act, and, in the case of the largest LECs, nonstructural safeguards designed to prevent or reveal discrimination, video programmers are subject to no Title II nondiscrimination obligations or requirements.[154] We therefore conclude that, without special safeguards, permitting video programmers wide latitude in participating in the operation of the basic video dialtone platform raises too great a risk of discrimination. Nevertheless, we may permit discrete roles for video programmers in operating the video dialtone platform if we conclude that the benefits of permitting such roles outweigh any risk of discrimination that they raise. For example, in the Third Further Notice, we seek comment on the operation of shared channel mechanisms, including the possibility of allowing video programmers to play some role in the operation of such mechanisms.[155] While we do not now prejudge the issues raised in that Notice, we wish to clarify that our general policy of prohibiting video programmers from participating in the operation of the video dialtone platform would not necessarily preclude such shared channel mechanisms.

97. These modifications aside, we otherwise affirm our rules governing non-ownership affiliations. We also affirm that we are not statutorily precluded from allowing LECs to exceed the carrier-user relationship in providing video dialtone service. As we stated in the Second Report and Order, the 1984 Cable Act did not codify the Commission's then-extant interpretive notes to the telephone company-cable cross-ownership rules limiting LECs to a strict common carrier-user relationship. Rather, Congress adopted the basic underlying policy of the cross-ownership rules without codifying the precise rules themselves.[156] The cross-ownership rules were intended to foreclose telephone companies from participating in the video marketplace as traditional cable operators, which select or provide the video programming available to subscribers

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154 Even though LECs could be liable for violations of the Communications Act by a video programmer with which it operated the video dialtone platform, we are concerned that the LEC in some instances might not be able to prevent discrimination by a video programmer which is not itself subject to Title II of the Act.

155 See infra Third Further Notice, paras. 268-275.

156 Second Report and Order, 7 FCC Rcd at 5815, para. 66.

over a cable system.[157] We are thus not precluded from allowing LECs an expanded role in the video marketplace, provided that LECs do not assume the role of traditional cable operators.[158] No party has offered any new argument or otherwise convinced us that our earlier decision was incorrect. Nor are we persuaded that our rules governing LEC provision of enhanced services to video programmers constitute a re-regulation of such services without proper notice. Contrary to US West's assertion, our video dialtone rules give LECs greater freedom with respect to video-related enhanced services, because prior to video dialtone, LECs were prohibited from offering these services at all in their telephone service area.

98. We reject assertions that allowing non-ownership relationships effectively permits LECs to engage in the provision of video programming directly to subscribers in their service areas. Our rules expressly prohibit LECs -- directly or indirectly or through an ownership or non-ownership affiliation relationship -- from determining, inter alia, how video programming is presented for sale to consumers. They may not make decisions concerning the bundling or tiering of video programming or the price, terms or conditions of the offer of video programming to subscribers. While some argue that providing video gateways will necessarily involve LECs in such prohibited activities, we do not believe this to be the case. LEC-provided video gateways may facilitate access by subscribers to certain video programming, but subscribers to the gateway would remain free to pick and choose any programming on or off the gateway. Thus, no prohibited bundling would be involved. Moreover, each video programmer on the gateway would set the price, terms and conditions under which its programming would be available to subscribers, including the tiering of such programming. LECs offering gateways would be permitted no role in this process. Therefore, we do not believe that permitting non-ownership affiliations will enable LECs to provide video programming directly to subscribers in their service areas.[159] Moreover, in authorizing LECs to enter into certain non-ownership relationships with video

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157 Id. at 5816-17, paras. 66-69. See also NCTA v. FCC, No. 91-1649, slip op. at 18 (D.C. Cir. August 26, 1994) ("cable operators exercise 'a significant amount of editorial discretion regarding what their programming will include,'" citing FCC v. Midwest Video Corp., 440 U.S. 689, 707 (1979)).

158 Id.

159 See discussion regarding ownership affiliations, supra paras. 64-74; NCTA v. FCC, No. 91-1649, slip op. at 12-13 (D.C. Cir. August 26, 1994) ("That a telephone company may provide unregulated enhanced services under its video dialtone authorization does not mean that it will engage in the 'transmission of video programming' as contemplated by the Act").

programmers, we find that these relationships would not normally confer ownership or control. If, however, in a particular situation, a LEC's non-ownership relationships confer de facto ownership or control of a video programmer, we will treat those relationships as cognizable interests for purposes of our cross-ownership rules.[160]

99. We also reject assertions that permitting non-ownership affiliations will substantially increase LEC incentives and ability to discriminate in favor of affiliated programmers or against nonaffiliated programmers. Because the video dialtone platform must be provided on a common carrier basis, LECs are prohibited by Section 202 of the Act from engaging in unreasonable discrimination in their provision of video dialtone service. They are also required to tariff their basic video dialtone offerings and submit to the Section 208 complaint process if a video programmer files a complaint alleging discrimination. In addition, we have in place nonstructural safeguards and cost allocation rules designed to prevent discrimination and cross-subsidization.[161] These rules, which were developed to ensure that the BOCs and GTE do not discriminate or cross-subsidize in favor of their own enhanced service operations, should also ensure that these LECs cannot favor particular classes of video programmers over others. Given these requirements and safeguards, we do not find that a non-ownership relationship, which entails no equity interest, creates sufficient risk of undetectable discrimination as to warrant restricting LECs to carrier-user relationships with video programmers. To the contrary, LECs are permitted to enter into many such relationships in the non-video context, and we have seen no evidence that these relationships have resulted in unlawful discrimination.[162]

100. Moreover, parties seeking to restrict LECs to a carrier-user relationship with video programmers ignore the costs associated with excessive restrictions. For example, prohibiting LECs from providing enhanced or other nonregulated services denies subscribers and programmers the benefits of those services. Similarly, prohibiting LECs from providing financing to independent video programmers could deny such programmers a needed source of capital. Therefore, we conclude that any risk of anticompetitive consequences is outweighed by the benefits that could derive from

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160 See Intermountain Microwave, supra note 110.

161 See infra sections IV.B.2 - IV.B.4.

162 For example, the fact that LECs are permitted to provide billing and collection services to interexchange carriers has not to our knowledge resulted in discrimination by LECs against carriers that choose not to use LEC billing services or in favor of those that do.

the non-ownership affiliations we now permit. Nevertheless, we will remain vigilant in ensuring that LECs do not engage in improper discrimination or cross-subsidization.

101. To summarize, LECs may provide enhanced or other nonregulated services related to the provision of video programming to any video programmer, including a cable operator, in areas substantially served by a video dialtone platform. LECs may also enter into other types of non-ownership relationships with video programmers that are not franchised cable operators, except that they generally may not jointly operate the video dialtone platform. LECs may not, however, otherwise exceed the carrier-user relationship in their telephone service area with franchised cable operators, except to lease cable drop wires. We believe that these modifications of the non-ownership affiliation rules make them more consistent with our overall video dialtone policies.

102. We note that LECs remain unrestricted in the provision of enhanced or other nonregulated services unrelated to the provision of video programming, whether within or outside the LEC service area.[163] LECs also remain unrestricted in the provision of video programming directly to subscribers outside their service area. Finally, for purposes of our non-ownership affiliation rules, we will treat debt that is convertible to stock as non-cognizable unless the interest is converted, or, based on an analysis of the specific facts involved, we conclude that the interest confers control over a video programmer. This is consistent with our treatment of convertible debt in other areas.[164] Moreover, to the extent the equity interest would be impermissible, LECs would be unable lawfully to convert the debt. Therefore, it is proper to view it as debt, rather than equity, unless and until any such conversion occurs.

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163 Second Report and Order, 7 FCC Rcd at 5797, para. 30 n.70; 47 C.F.R. § 63.54(d)(2) (1993).

164 See, e.g., Attribution of Ownership, 97 FCC 2d at 1020-23, paras. 45-52; Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN. Docket No. 90-314 and ET Docket No. 92-100, FCC 94-144, 59 Fed. Reg. 32830 (June 24, 1994). We recognize that convertible debt is treated differently in our Personal Communication Services auction rules. Those rules differ because of our desire to ensure that small businesses and those owned by women and minorities have sufficient financing options available to them. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, FCC 94-178 (July 15, 1994). See also Signal Ministries, Inc., 104 FCC 2d 1481, 1490-91, para. 11 (Rev. Bd. 1986); National Broadcasting Company, Inc., 6 FCC Rcd 4882, 4882-83 (1991).